

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

77-4115

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERCONEX, INC.,

Petitioner,

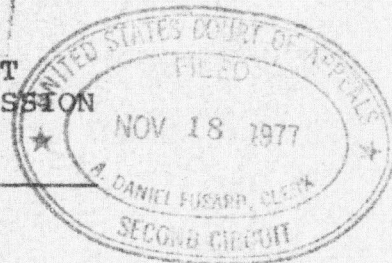
v.

FEDERAL MARITIME COMMISSION
AND THE UNITED STATES OF
AMERICA,

Respondents.

DOCKET NO. 77-4115

BRIEF OF RESPONDENT
FEDERAL MARITIME COMMISSION



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November 17, 1977

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STATEMENT OF THE ISSUES

I. Whether a claim dependent for its vitality on a Commission finding of liability in another case, which is subsequently settled by claimant, should be dismissed as not presenting a justiciable controversy.

II. Whether Interconex's settlement with Colt, AEL and U.S. Lines, and the pending District Court action with Sea-Land have nullified Commission adjudication of Interconex's contingent claim.

COUNTERSTATEMENT OF THE CASE

Whatever the reason, Petitioner Interconex, Inc. is either unable or unwilling to follow the rules of practice for this Court or the Federal Maritime Commission, whose rules present one of the controversies in this appeal.^{1/} Federal Rules of Appellate Procedure Rule 28, and this Court's local rule provide that briefs are to set forth a statement of the issues followed by a concise and simple statement of the relevant facts underlying the issues to be heard on appeal. Without initially setting forth what it deems to be the principal issues in the case, petitioner, after a statement of the Court's jurisdiction, commences its statement of facts with an opening paragraph that should be properly reserved for introducing the argument portion of its brief. Because of the added legal and philosophic arguments which follow thereafter in the statement of facts, and petitioner's incomplete, misleading or inaccurate

^{1/} Petitioner did not comply with Federal Appellate Rule 30(b) requiring the designation of the Joint Appendix to be furnished respondent within 10 days of the filing of the Index of the Record, and no effort was made by petitioner or agreement reached for the filing of a deferred appendix pursuant to Rule 30(e). Instead, the Commission was notified of petitioner's designation for the joint appendix three days before its brief was due.

See also Interconex's failure to file a verified complaint pursuant to Commission Rule 8(b) (46 C.F.R. 502.112(b)) (J.A.No. 11, p. 2; J.A. No. 13, p. 3); and its failure to file, in conformity with Commission Rule 8(h) (46 C.F.R. 502.118), the required number of copies for replying to motions to dismiss J.A. No. 16

portrayal of actions and events which occurred in the proceedings below, this counterstatement of the facts appears essential.

The case before the Federal Maritime Commission, hereinafter referred to as either the "Commission" or "FMC", commenced with the filing by Colt Industries Operating Corp. (Colt) on June 5, 1975, of a conventional reparation claim pursuant to Section 22 of the Shipping Act, 1916 46 U.S.C. 821.^{2/} In its complaint, Colt charged Interconex, Inc. (Interconex), the common carrier it was dealing with on its shipments to Korea, with overcharges estimated at \$500,000. This was accomplished, according to the Colt complaint, by Interconex misstating the cubic measurements and/or weights on the shipments in question and thereby violating Section 18 of the said Shipping Act 46 U.S.C. 817(b)(3) by Interconex's receipt of compensation for transportation services in excess of its tariff on file with the Commission. However, since Interconex operated as a non-vessel operating common carrier by

2/ Section 22 provides in relevant part:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. . .

water (NVOCC),^{3/} the Colt complaint also charged with violations of the said Section 18(b)(3) the three underlying carriers utilized by Interconex to actually transport the Colt shipments from U.S. ports to Korea. These underlying carriers were identified as American Export Lines, Inc. (AEL), United States Lines, Inc. (USL) and Sea-Land Service, Inc. (Sea-Land). The Commission docketed or assigned the Colt complaint for hearing in FMC Docket No. 75-19 (Joint Appendix Nos. 1, 2 and 3, hereinafter designated as "J.A. No. ____").

Interconex and the other respondent carriers moved for and received extensions of time in which to respond to the Colt complaint. On June 25, 1975, however, Interconex filed a complaint, which it characterized as ". . . a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure. . . ." This Interconex pleading named AEL, USL and Sea-Land as respondents, incorporated by reference the Colt complaint in FMC Docket No. 75-19, and contingently alleged that if Interconex is ultimately required to pay reparation to Colt. . . . the underlying carriers may also be liable and may be required to indemnify Interconex for all or a part of such reparation.

^{3/} Petitioner's Brief, hereinafter referred to as "Pet. Br.", p. 2, n. 2, accurately describes the role of a NVOCC vis-a-vis his shipper and his carrier.

This pleading was returned to Interconex by the Commission's Secretary on June 26, 1975, with the notation that the complaint --

. . . does not allege a violation of the Shipping Act as required by Section 22 of the Commission's Rules of Practice. 4/ Further, the Commission has no rule similar to Rule 13(g) of the Federal Rules of Civil Procedure which would allow filing of a cross-claim. (J.A. No. 5)

Although alerted to possible defects in its pleading, Interconex was insistent that its complaint be received and ruled upon by the Commission as filed (J.A. No. 6). The Secretary of the Commission accepted the Interconex complaint on July 2, 1977, and it was docketed and assigned for hearing in FMC Docket 75-25. Both FMC Docket Nos. 75-19 and 75-25 were designated for hearing before Administrative Law Judge William Beasley Harris.

Motions to dismiss the Colt complaint in Docket 75-19 were filed by Interconex and the other carriers. Interconex also counterclaimed in Docket 75-19 and sought reparation recovery from Colt in an amount exceeding one million dollars (J.A. No. 11, pp. 106-107). Similar motions to dismiss were also filed by Sea-Land, USL and AEL in the cross-complaint action of

4/ Rule 5(b) of the Commission's Rules of Practice (46 CFR 502.62) is attached hereto as Appendix A.

Interconex in Docket 75-24, and were based essentially on: a) failure to allege specific violations of the Shipping Act; b) failure to set forth specific transactions or offenses that could be responded to by respondent carriers; c) proceeding by way of cross-claim for indemnification which is neither provided for by statute or Commission Rules; and d) alleging contingent claims time-barred by the two-year statute of limitations under Section 22 of the Shipping Act ^{5/} (J.A. Nos. 11(b) 11(c), 11(d) and 17).

Judge Harris waited for the prescribed 15-day period for replies to carriers' motions to dismiss in Docket 75-24, and, receiving none, ^{6/} issued his order on August 11, 1975 dismissing Interconex's cross-complaint and discontinuing the proceeding (J.A. No. 17). By motion dated August 15, 1975, Interconex moved for reconsideration of the August 11th order dismissing the cross-complaint.

Following his tardy receipt of the Interconex replies, however, Judge Harris did not wait for the motion for reconsideration, but instead filed on August 15th, his "Order

^{5/} The August 11, 1975 order of Judge Harris dismissing the Interconex cross-complaint did not rely on the Kraft case, which was also urged by two carrier respondents as grounds for dismissal. Infra, pp. 19 - 20.

^{6/} It was subsequently shown, as set out in Judge Harris' sua sponte order of August 15, 1975 (J.A. No. 19, p. 2), that Interconex replies had been brought to the Commission's office of the Secretary on August 6, 1977, but not being filed with the prerequisite number of copies (J.A. No. 16), the Interconex replies were not forwarded to Judge Harris until August 12, 1975 (J.A. No. 18, p. 2).

Upon Sua Sponte Reconsideration of Order Served August 11, 1975. . ." in which he specifically considered Interconex's replies to each of the motions to dismiss previously filed by the carriers. The discussion portion of the order states:

. . . it cannot be said that Interconex has supplied convincing arguments or data to support that the statutes and Rules of Practice and Procedure under which the Commission operates, permit sustaining of what Interconex admits is in the nature of a counterclaim (sic) as allowed in the United States District Courts under the Federal Rules of Civil Procedure. The Federal Maritime Commission is simply without authority so to proceed. Further, under the positions and arguments taken in the motions to dismiss, as opposed to those in the replies now considered, dismissal of the complaint seems warranted. (J.A. No. 19, p. 4)

Judge Harris regarded Interconex as unconvincing in trying to fit its contingent counterclaim (sic) pleadings into the rules of practice followed by the Commission, even though such proceedings are allowed in the District Courts of the United States. In proceedings brought pursuant to section 22 of the Shipping Act, the Commission's statutory limits extend only to awarding reparations to shippers or other persons injured by a carrier's overcharges or other violations of the Shipping Act - not to adjudicating offsets, claim liability, counter claims or cross claims on shipments between multiple carriers.

In concluding his order, Judge Harris affirmed the action taken in his August 11th order dismissing the cross-complaint. An appeal of this order was filed with the Commission by Interconex on August 25, 1975 (J.A. No. 20).

Continuing in the background, however, was Colt's initial reparation complaint in Docket No. 75-19, the counterclaim

EDITOR'S NOTE

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when obtained, a corrected fiche will be forwarded to you.

agreement, Interconex agreed to refrain from appealing Judge Harris's decision in Docket No. 75-19 upon which Interconex premised its complaint in Docket No. 75-25. ^{8/}

While differences were settled with Colt and the Republic of Korea, and they in turn with the other carriers, Interconex could not in the Docket No. 75-19 proceeding reach an agreement for settlement with the other carriers. Indeed, even before the settlement agreement with Colt and Korea had been concluded, Interconex was sued by Sea-Land for allegedly withholding certain freight charges on shipments included under the Colt complaint in Docket No. 75-19. Interconex responded to the Sea-Land suit by counterclaiming for alleged overcharges on such shipments by Sea-Land. ^{9/} This pending Sea-Land action in the district court is the only remaining, unresolved claim prompted by Colt's original complaint in Docket No. 75-19. Shortly after the Colt settlement, Interconex also reached a settlement understanding with AEL without resort to litigation (Pet. Br. p. 8). And a related claim action in the U.S. District Court between Interconex and U.S.L. which recently withdrew as a respondent-intervenor herein, has also reportedly been settled. ^{10/}

^{8/} J.A. No. 31; Pet. Br., p. 13.

^{9/} Sea-Land Service, Inc. v. Interconex, Inc., Civ. Act. File No. 77 1332 RLC, S.D.N.Y.

^{10/} Interconex, Inc. v. U.S. Lines, Civ. Act. File No 77 2700 RO, S.D.N.Y.

This was the factual setting before the Commission when it served its April 1, 1977 order giving rise to this appeal.^{11/} With this background, the Commission decision stated that it could not now "allow ICX (Interconex) to amend its complaint making clear its independence from Colt's complaint." As stated by the Commission:

"We view ICX's complaint as a contingent claim based upon a set of circumstances which now cannot come about.

The complaint of ICX in this proceeding being "in the nature of a crossclaim" did not constitute a wholly independent cause of action but rather relied for its vitality upon the catalytic effect of a finding that ICX was liable to Colt Industries for assessing improper charges. . .

* * *

ICX itself in its appeal recognized the contingency of its claim when it advised that:

. . . ICX has no reason to make any unconditional claim against the underlying carriers unless it is held liable to Colt. .
emphasis original

and that:

Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot -- in which case the ICX complaint can be dismissed or withdrawn.

^{11/} Commission counsel was not a party to the proceedings in either FMC Docket No. 75-19 or 75-24 and, like a Court, the Commission had no way of knowing, except upon the record before it, how its forum and rules were being used by Interconex and the other parties to best serve their respective tactical, pecuniary or other interests.

The contingency -- i.e., a finding of ICX's liability in Docket No. 75-19 -- failed, however when the claim of Colt against ICX was dismissed. . .

* * *

It is this order, which was dependent on the Docket No. 75-19 proceeding and could not be logically issued until some resolution therein had been reached by the parties, that serves as the subject of the present appeal.

ARGUMENT

The principal issue in this appeal turns not on whether the underlying carriers received proper notice of Interconex's contingent claim, but that Interconex elected to ground its whole claim on the outcome of another related proceeding which Interconex subsequently agreed to settle. The Commission played no part in the decision of Interconex's experienced maritime counsel to condition its claim in Docket No. 75-24 on an adjudication of liability in Docket No. 75-19, nor did the Commission participate in the settlement reached with Colt whereby Interconex accepted, without question, Judge Harris' ruling in Docket No. 75-19 and thereby waived the basis for its contingent claim in Docket No. 75-24.

I. A Claim Dependent For Its Vitality On A Commission Finding Of Liability In Another Case, Which is Subsequently Settled by Claimant, No Longer Presents a Justifiable Controversy and Should Properly Be Dismissed

From the outset, Interconex was on notice of the tenuous validity of its contingent reparation claim in Docket No. 75-24. ^{12/} The original filing of its complaint in the nature of a "cross-claim" against the carriers was returned by the Commission's Secretary, though improperly, under the authority delegated to him (J.A. Nos. 6 and 7), with the admonition that the pleading did not contain: (a) an allegation of a Shipping Act violation as required by Rule 502.62 of the Commission's Rules of Practice (46 C.F.R. 502.62); and (b) the Commission's rules do not allow for cross-claim pleading ^{13/} (J.A. No. 5). At that time,

^{12/} See Pet. Br. pp. 35-37.

^{13/} The Commission does not view its statutory authority as permitting cross- counterclaims or general equity relief under Section 22, which gives the Commission discretionary authority only to award reparations relief to aggrieved shippers. See Transpacific Freight Conference of Japan v. Federal Maritime Board, 302 F.2d 875, 880 (D.C.Cir., 1962); U.S. v. Columbia S.S.Co., 17 FMC 8, 10-11 (1973). As stated by Judge Harris in his order of September 5, 1975, in Docket No. 75-19 (J.A. No. 21, pp. 2 -12) the Commission is not a court of general jurisdiction permitted to adjudicate and allocate the recovery of claims between contesting claimants. It can neither award shipping

Footnote continued on next page.

Interconex could have revised its pleading into an independent, conventional reparation complaint with allegations in "affirmative" rather than on "contingent" terms supplementing the answer and position taken by it in defending against Colt's complaint in Docket No. 75-19 (J.A. Nos. 11, 12b and 17b). It could have also filed a protective action in the District Court if it was concerned about the Statute of Limitations running. Interconex insisted, however, that the Commission consider the complaint as originally filed with its contingent allegations, namely:

" . . . if Interconex is finally required to pay reparation to Colt under or in consequence of the Colt complaint in Docket No. 75-19, the underlying carrier -- respondents herein - will or may be required to indemnify Interconex for all or part of such reparation.

" . . . this complaint (in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure) is filed against the undelying carriers . . . on the ground that they are or may be liable to Interconex for all or part of Colt's claim against it. . .

* * *

"WHEREFORE, . . . if after hearing Colt's complaint in Docket No. 75-19, the Commission orders Interconex to pay reparation to Colt, it also order those underlying carriers to pay reparation to Interconex. . . (J.A. No. 4, p. 3)

13/ Footnote continued from previous page.

undercharges to a carrier nor apportion misfreightments between carriers participating on commercial shipments. See Consolo v. Federal Maritime Commission 383 U.S. 607, 615 (1960). It is for this reason that the Commission does not have rules permitting counter-claims or cross-claims under Section 22. The recourse by carriers on such claims against shippers is in the court, as illustrated by Sea-Land in its related federal court action against Interconex for withholding freight charges. Sea-Land Service, Inc. v. Interconex, Inc., supra.

Although the complaint in Docket No. 75-24 also requested that it be consolidated for hearing with the proceedings in Docket No. 75-19, Interconex settled in the latter proceeding before the Commission could act on this request.

Notification by the Commission's Secretary to Interconex to conform its reparation pleading to the Commission's rules dealt mainly with provisions of Rule 502.62 , which require:

1. A concise statement of the course of action, and a request for relief or other affirmative action.
2. Allegations setting forth sufficient details on the shipments in question and the amount of damage or relief sought. 14/
3. Notice that reparation will not be awarded upon a complaint in which it is not specifically asked for, nor upon a new complaint, by or for the same party, which is based upon a finding in the original proceeding.
4. The complaint is to indicate the sections of the acts violated and to clearly state facts to support such allegations, which if not done may, in the Commission's discretion, be required to be done by complainant.

Reasonable conformity with such requirement is not only to advise the Commission of the nature and basis for the claim, but to furnish respondents with adequate details to allow them to develop their defense and to prepare for hearing.

Interconex elected, however, to stand or fall on its complaint as originally submitted. 15/

14/ Interconex, itself, urged as grounds for seeking dismissal of the Complaint that "the Complaint Fails to State The Amount of Alleged Damage." (J.A. No. 176, p. 7)

15/ In demanding that its complaint be considered as filed, Interconex concedes that its pleading, "being an adversary document, is presumably dismissible on motion" (J.A. No. 6, p. 2) which was subsequently made by respondents in Docket No. 75-24 (J.A. Nos. 11b, 11c. and 11d.) and granted by Judge Harris (J.A. Nos. 17 and 19).

Neither the Commission or respondent carriers in Docket No. 75-25 claim that the Interconex complaint failed to afford the parties with a generalized summary of the case or notice of the contingent claims made against them. (Pet. Br. p. 16). However, if the Interconex claim was to stand as a claim separate and independent from the Colt claim, the underlying respondent carriers demanded to be advised either of the details of the alleged claims against them, some of which may be barred by the statute of limitations, or that the complaint be dismissed (J.A. Nos. 11b, 11c. and 11d.). Interconex answered that it well may be that some claims arising before June 4, 1973 would be barred by Section 22 of the Shipping Act, but any others would be determined by the decision in Docket 75-19 (J.A. Nos. 13, 14 and 15).

It is the Commission's practice, and its rules are so designed, to follow the current trend by administrative agencies of liberal pleading standards. However, where the agency is not a party to the proceeding, but serves only as the forum for determining claims between private parties, the Commission believes the architects of a complaint instituting such proceedings should be more closely bound by the classic rules of pleading.^{16/} In following this course, the Commission neither sides with one party or the other in the development and pleading of their respective claims and

^{16/} See FTC v. Gratz, 253 U.S. 421 (1920).

defenses. However, it is necessary for a claimant to notify the respondents of what they are expected to answer. As stated in Davis, Administrative Law Treatise, Sections 8.04, p. 524, "The essential requirement is that the charge shall be described with reasonable certainty in order to enable the defendant to prepare his defenses." This requirement of specificity is also essential to set a standard of relevance which will govern the proceedings at hearing.^{17/} The question then was not whether the Commission had before it adequate and proper notice of the nature of Interconex's contingent claims, as characterized by Interconex in citing the Sisia and Akers cases ^{18/} (Pet. Br. p. 20), but whether the underlying carriers were given ". . . reasonable assurance to learn the claims made against them and to meet them." Empire Truck U-Drive It, Inc., 17 ADL 2d 116 (ICC 1964).

While some basis may have existed for the Commission to exercise continuing jurisdiction over Interconex's contingent claim in Docket No. 75-24 during the pendency of proceeding in Docket No. 75-19, the foundation for the Interconex complaint was no longer there when Interconex agreed to settlement with Colt, and what it evidently thought would be settlement with the underlying carriers (J.A. Nos. 24 and 31) in Docket No. 75-19. It is fundamental that where a complaint and a cross-

17/ See Douds v. International Longshoremen's Ass'n, 241 F.2d 278, 283 (2d Cir. 1957).

18/ Sisia v. Flemming, 183 F. Supp. 194 (E.D.N.Y. 1960); Akers Motor Line v. United States, 286 F.Supp. 213 (W.D.N.C. 1968).

or contingent-complaint are based on the same transactions, consideration can be given to the contingent complaint by way of recoupment or set-off against any reparation awarded complainant, but there would be no right of recovery in such case when the basic or underlying complaint is dismissed.

19/ The basis upon which Interconex predicated its complaint in Docket No. 75-24, therefore, dissolved when the basic claim in Docket No. 75-19 was voluntarily settled. This was the posture of the proceedings when the Commission, by its decision here under review, upheld Judge Harris' order dismissing the proceedings in Docket No. 75-24.

II. Settlements With Colt, AEL and U.S. Lines, And
The District Court Action With Sea-Land Have Nullified
Commission Adjudication of Interconex's Contingent Claim

In the latter part of its brief, Interconex attempts to shift to the Commission full blame for not acting sooner on Judge Harris' August 15, 1975 order dismissing the contingent complaint in Docket No. 75-24. (Pet. Br. pp. 32-36). But as previously discussed, the vitality of and relief sought in that complaint were completely dependent on the outcome of the Colt

19/ See In re PACA, Doc. No. 4764, 8 AD 1276, 3 ADL 41 4-
(D.A. 1949)

case in Docket No. 75-19. By timely filing its appeal on August 25, 1975, Interconex preserved its appeal right in Docket No. 75-24 pending its negotiations for settlement or other resolution of the underlying Colt claim. As stated in its appeal, however, Interconex took the position "that there is no need (for the Commission) even to pass on the motion to dismiss until the Colt case is decided." (J.A. No. 20, p. 6).

Judge Harris dismissed the Docket No. 75-19 complaint on September 5, 1975. Before the 15-day period in which to appeal that order ended (46 C.F.R. 502.227), Interconex and other parties in Docket No. 75-19 sought and were granted successive extensions of time in which to file their appeal. The last extension, nearly 8 months after Judge Harris' order in Docket No. 75-19, ended on April 26, 1976 without an appeal being filed. (J.A. Nos. 22 through 30). Throughout this period and thereafter, the Commission was given every indication that a complete settlement by all parties in Docket 75-19 was imminent. As reported to the Commission by Colt's attorney on November 6, 1975, "We are now able to represent to the Commission that additional progress toward settlement has been made. Indeed, we expect to receive shortly from counsel for Interconex a firm offer of settlement. . ." (J.A. No. 24). Similiar representations of a pending settlement were made by Interconex in its letter of April 28, 1976 to the Commission (J.A. No. 31). It was not until Interconex filed its reply to

U.S.L motion for dismissal of the appeal in Docket No. 75-24 on August 23, 1976 that the Commission was notified that "Interconex and the underlying carriers, however, were not able to reach agreement" (J.A. No. 35, p. 5). Notwithstanding this notice, the Commission learned shortly thereafter that a settlement had been reached with the underlying carrier, AEL (Pet. Br. p. 8).

Also contributing to deferral of Commission action on Interconex's appeal in Docket 75-24 during mid-1976 was the reliance placed by Interconex and the other underlying carriers on the Commission's decision in Kraft Foods v. Moore McCormack, Inc., FMC Dkt. No. 73-44, 14 SRR 603 (1974), then pending review and decision by the Court of Appeals for the District of Columbia. ^{20/} The Kraft rule adopted by the Commission upheld a tariff rule barring a shipper's recovery of overcharges on alleged cargo measurements when, before claim and verification, the shipment left the custody of the carrier. Interconex relied on this rule in urging defeat of Colt's reparation claim against it in Docket No. 75-19 (J.A. No. 176, pp.5-7) and, correspondingly, the carriers cited this rule to defeat Interconex's cross-claim in Docket No. 75-24 (J.A.Nos. 11b, pp. 5-7; 11d, pp. 7-9, 21b, pp. 6-8; 21c, pp. 11-13). However, such legal grounds for defeating the claims in Docket No.

^{20/} Kraft Food v. Federal Maritime Commission, 538 F.2d 445 (D.C.Cir. 1976).

75-19 and 75-24 were lost when the appeals court in Kraft held on July 13, 1976, that such a tariff rule cannot be used to defeat a shipper's statutory right to bring a reparation action within the two-year period authorized by Section 22 Kraft Foods v. FMC, supra, at 447.

As a result of the Kraft holding, a new set of pleadings were exchanged by Interconex and U.S.L. (J.A. Nos. 32, 33, 34 and 34a). Still holding open the Commission's determination of the appeal in Docket No. 75-24, Interconex asked as late as August 23, 1976, that the Commission also consider its "Reply . . . to U.S. Lines, Inc., Motion to Dismiss the Interconex Appeal from the (August 15, 1975) Order of Dismissal" (J.A. No. 35).

From the date (August 25, 1975) on which Interconex informed the Commission "that there is no need even to pass on the motions to dismiss until the Colt case is decided", throughout the period of settlement negotiations in Docket No. 75-19, and up until the date (August 23, 1976) of the foregoing "Reply" of Interconex, the petitioner at no time moved for a ruling or expeditious consideration of its appeal in Docket No. 75-24.

Instead of showing an unreasonable delay on the part of the Commission, the proceedings, after Judge Harris entered his order of dismissal on August 15th, 1975, illustrate how Interconex used this delay to actively pursue a negotiated resolution of the claims involved in the underlying Colt

complaint. Today, all claims have been resolved except those involved in the pending District Court action between Sea-Land and Interconex. Settlements reached with Colt, Republic of Korea, AEL and U.S.L. have nullified Interconex's counterclaim in Docket No. 75-19, and its contingent cross-claim in Docket No. 75-24. For Interconex, it is incongruous now to seek a reopening of evidentiary hearings on claim transactions that may develop liabilities different from those agreed to in settlements by the parties.

The logical and proper course, therefore, is to let Sea-Land and Interconex pursue their claim litigation stemming from the Colt transactions in the pending District Court action. It has been shown that Section 22 does not give the Commission jurisdiction over claims by carriers against shippers like Interconex.²¹ Additionally, this section of the Shipping statutes has been held not to give the Commission exclusive jurisdiction over such reparation claims. As stated by District Court Judge Rubin in Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 15 SRR 161, 168-169 (E.D. La. 1976):

There is no impediment to the recovery in this Court, of ordinary damages. While "reparation for the injury" caused by a violation of the Shipping Act may be sought before the Commission under 46 U.S.C. Sec. 821 (Section 22), its jurisdiction does not appear to be exclusive.

²¹/ Consolo v. Federal Maritime Commission, supra. p. 615; see also n. 13. supra.

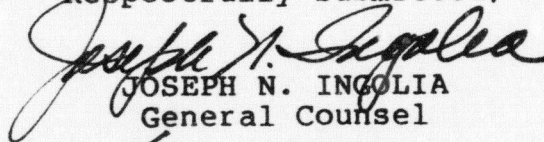
The general jurisdiction of the District Courts has conventionally been used by carriers for damage recovery resulting from non-payment or under payment of ocean freight charges by shippers. ^{22/} And there is no reason why Sea-Land and Interco ex should not be allowed to pursue such District Court relief in the present case. This will follow from the Court's affirmance of the Commission's order of dismissal in Docket No. 75-24.

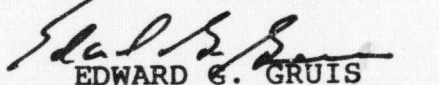
^{22/} Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053, 1056-57 (2nd Cir. 1932); See also Colgate Palmolive Co. v. The Grace Line, 12 SRR 155 @ 158 (FMC No. 194(I) 1971); and CSC International, Inc. v. Orient Overseas Container Line, 16 SRR 1591, 1599 (FMC 76-1, 1976).

CONCLUSION

For the foregoing reasons, the Federal Maritime Commission's decision dismissing Interconex's appeal for Judge Harris' order of dismissal in Docket No. 75-24 should be affirmed.

Respectfully submitted,


JOSEPH N. INCOLIA
General Counsel


EDWARD G. GRUIS
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Federal Maritime Commission

Washington, DC
November 17, 1977

APPENDIX

Rule 5(b) of the Commission's Rules of Practice provides:

The complaint shall contain the name and address of each complainant, the name and address of complainant's attorney or agent, the name and address of each carrier or person against whom complaint is made, a concise statement of the cause of action, and a request for the relief or other affirmative action sought. Where reparation is sought and the nature of the proceeding so requires, the complaint shall set forth the ports of origin and destination of the shipments, consignees, or real parties in interest where shipments are on "order" bill of lading, consignors, date of receipt by carrier or tender of delivery to carrier, names of vessels, bill of lading number (other identifying reference), description of commodities, weights, measurement, rates, charges made or collected, when, where, by whom and to whom rates and charges were paid, by whom the rates and charges were borne, the amount of damage, and the relief sought. Except under unusual circumstances and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically asked for, nor upon a new complaint by or for the same complainant which is based upon a finding in the original proceeding. Wherever a rate, fare, charge, rule, regulation, classification, or practice is involved, appropriate reference to the tariff should be made, if possible. If complaint fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegations, the Commission may, on its own initiative, require the complaint to be amended to supply such further particulars as it deems necessary. The complaint should designate the place at which hearing is desired. A form of complaint is set forth in Appendix II(1). [46 CFR 502.62]

APPENDIX

CERTIFICATE OF SERVICE

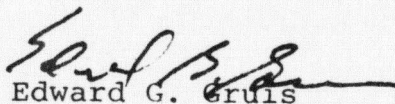
I hereby certify that I have this 17th day of November, 1977 served a copy of the foregoing Brief of Respondent Federal Maritime Commission by first class mail, postage prepaid upon each of the following parties herein:

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